

# SNYDER V. PHELPS: PUBLIC SERVANT OR PRIVATE CITIZEN?

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USAWC CIVILIAN RESEARCH PROJECT

***SNYDER V. PHELPS:***  
**PUBLIC SERVANT OR PRIVATE CITIZEN?**

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## **ABSTRACT**

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This paper advocates that the Supreme Court should have ruled against the Phelps family on the issue of their right to engage in offensive, albeit peaceful, free speech at the funerals of service members and provides an analytical framework for such a ruling. It then looks at the Court's ultimate decision, the dissenting opinion of Justice Alito, and contrasts the two opinions. Finally it seeks to show why this case is important to the military.



## SNYDER V. PHELPS: PUBLIC SERVANT OR PRIVATE CITIZEN?

In October 2010, the United States Supreme Court heard arguments in *Snyder v. Phelps*, and decided whether the First Amendment of the U.S. Constitution protects outrageous speech directed at a private individual. While the facts of the case are undisputed, the underlying issues are emotionally charged. Lance Corporal Matthew Snyder fulfilled a childhood dream when he enlisted in the United States Marine Corps. He trained at Camp Lejeune, North Carolina as a generator mechanic and was assigned to the Marine Combat Logistics Battalion, Twentynine Palms, California. He deployed to Iraq as a member of the Combat Service Support Group, 1<sup>st</sup> Marine Logistics Group. Lance Corporal Snyder was killed after less than a month in country, while providing convoy security, when the vehicle he was riding in overturned. Matthew died on March 3, 2006.<sup>1</sup>

Lance Corporal Snyder returned to the United States in a flag-draped casket. His family was devastated. His father, Albert Snyder, so proud of his son's accomplishments, planned for his burial. While he had expected a quiet funeral and burial in Westminister, Massachusetts, his son's funeral became the platform for yet another Phelps family protest.

On March 10, 2006, seven members of the Phelps family,<sup>2</sup> including several children, held pickets outside Saint John's Catholic Church, claiming the death of Matthew Snyder and other U.S. soldiers is God's retribution for America's tolerance of homosexual conduct.<sup>3</sup> The signs read, "Semper Fi Fag," "Thank God for Dead Soldiers," "God Hates America," "You're Going to Hell," "God Hates You," "America is

Doomed,” “God Hates the USA/Thank God for 9/11,” “Don’t Pray for the USA,” “Thank God for IEDs,” and “God Hates Fags.”<sup>4</sup>

The funeral planners were careful to keep the demonstrators out of the sight of most funeral attendees, sending the family and guests through a back entrance of the church.<sup>5</sup> Mr. Snyder only saw the tops of the signs on his way into the church.<sup>6</sup>

Following the funeral mass and burial, as Mr. Snyder reminisced about his son, he looked for documentation of Matthew’s life. He turned on the local television news and found pictures of members of the Phelps family protesting outside the church where his son’s funeral was conducted. For the first time he saw the hate-filled signs and he was physically ill.<sup>7</sup> This is not the image for which he had hoped; this is not how he wanted to remember the most painful day of his life. It cut him to the core. Searching the Internet several weeks later, he found a posting from the Phelps family describing his son as a child raised to go to hell, a man condemned.<sup>8</sup> Mr. Snyder testified at trial that he vomited and cried for three hours after seeing the Internet “epic.”<sup>9</sup>

Albert Snyder was plagued by the images of the picketers outside his son’s funeral. He was not going to allow the Phelps family to desecrate the memory of his son. Mr. Snyder filed suit in Federal District Court in Maryland in June 2006.<sup>10</sup> He alleged the Phelps’ actions equated to defamation, intentional infliction of emotional distress, invasion of privacy, publicity given to private life, and conspiracy.<sup>11</sup> After a week of trial, the jury returned a verdict for damages in excess of ten million dollars.<sup>12</sup> The Phelps family appealed and the Fourth Circuit Court of Appeals found in their favor.<sup>13</sup>

Mr. Snyder appealed to the United States Supreme Court and on October 6, 2010, the Court heard arguments from both parties and rendered its decision on March 2, 2011. The Court was asked to decide whether the First Amendment of the U.S. Constitution protects the speech activity of the Phelps family from tort liability. More specifically, the Court was asked whether, (1) the speech used by the Phelps family was “loose, hyperbolic speech” which could not reasonably be interpreted as stating actual facts related to a public issue and should be protected by the First Amendment; (2) how to apply the public/private dichotomy the court has carved out in previous defamation and intentional infliction of emotional distress (IIED) cases;<sup>14</sup> and, (3) what First Amendment protections are available to speech between private citizens.<sup>15</sup> Following their arguments and the Courts decision, the parties are in the same position they were before the case was filed; the Phelps family and their church, Westboro Baptist Church, have achieved a level of notoriety and publicity that comes with trying a case before the highest court in the land and Albert Snyder continues to grieve the loss of his son and longs for a memory of his son that does not include the Westboro Baptist Church and their picket signs. The Supreme Court could have found that based on the time and place of the protest, the speech of the Phelps family was not on a matter of public concern, but rather was targeted at the Snyder family and allowed Mr. Snyder to be compensated for the pain he suffered. The Court however, read the facts very narrowly and extended First Amendment protections to this hurtful and disgusting conduct.

At the Court of Appeals, the Phelps alleged: (1) that their speech was protected as religious opinion, (2) that there is no privacy interest in a funeral, and (3) that they

were simply exercising their First Amendment rights by engaging in public speech on a public issue in a public place.<sup>16</sup> The appellate court spent the bulk of its opinion looking at the verity of the pickets using a defamation<sup>17</sup> framework to determine whether the Snyder family had been damaged. The court concluded that the Phelps pickets were protected by the First Amendment because “no reasonable reader would interpret any of the[se] signs as asserting actual and objectively verifiable facts about Snyder or his son,” and that the pickets “did not assert provable facts about an individual and they clearly contain imaginative and hyperbolic rhetoric intended to spark debate about issues with which the [Phelps] are concerned.”<sup>18</sup>

In reaching this conclusion, the appellate court relied extensively on *Milkovich v. Lorrain Journal Company*,<sup>19</sup> a defamation case. In *Milkovich*, a wrestling coach was accused in a local newspaper editorial of providing perjured testimony before the Ohio High School Athletic Association during an investigation into a fight that occurred following a wrestling match. While the Court found the publisher liable, the Court also held that “where a media defendant is involved, a statement on matters of public concern must be provable as false before liability for defamation can be assessed”<sup>20</sup> and that “statements that cannot reasonably be interpreted as stating actual facts about an individual are protected.”<sup>21</sup> The Court used the First Amendment to protect the media from any undue burdens that would prevent it from reporting on events of public concern in a timely fashion, even when all the reported “facts” cannot be verified.<sup>22</sup>

Relying on this defamation language, the Fourth Circuit looked to the veracity of the language used by Phelps, specifically, whether the pickets contained “actual facts” or merely rhetorical hyperbole. The court held that all the statements the Phelps posted

were protected because they did not assert provable facts about an individual, either Albert Snyder or his son, and that they clearly contained “imaginative and hyperbolic rhetoric intended to spark debate.”<sup>23</sup>

While some of the pickets could fit into the category of hyperbolic rhetoric, “God Hates You,” “You’re Going to Hell,” and “Semper Fi Fags” do not fit so neatly into that category. The District Court found these signs were specifically targeted at the Snyder family.<sup>24</sup> The appellate court however, found the use of the pronoun, “you” allowed the reader to conclude that the signs could be referring to Snyder and his son, or to a collective audience or even to the whole country.<sup>25</sup> The Fourth Circuit also found these statements were simply incapable of being proven as fact and were therefore protected. In the purest sense, these pickets could not be proven; no one knows what God thinks or who might be going to hell, but this is not a defamation case. The question before the court was, “is the language on the signs so outrageous as to cause harm to another.”<sup>26</sup> Truth is no defense to a charge of intentional infliction of emotional distress, even though it might be a defense to a defamation claim. The Fourth Circuit adopted a First Amendment analysis rather than a tort analysis. The court looked at the speech act, rather than at the context in which the speech was delivered and the injury that resulted. The Fourth Circuit however, cannot be condemned for their analysis, based on the conduct involved.

The Supreme Court has said, “in cases raising First Amendment issues an appellate court has an obligation to ‘make an independent examination of the whole record’ in order to make sure that the ‘judgment does not constitute a forbidden intrusion on the field of free expression.’”<sup>27</sup> The Fourth Circuit made such a

determination, but the analysis should not have ended there. Finding the speech to be outrageous and without verity, the court ended its analysis without looking at the status of the parties, e.g., private, public or media. The Supreme Court has applied different standards of protection to speech conduct depending on the status of the parties.

Generally, public figures and officials receive little protection from speech directed at them, even if personal in nature.<sup>28</sup> Private citizens are generally entitled to greater protection from speech acts directed at them and media organizations are given greater latitude for speech directed at public figures.<sup>29</sup> Had the court taken the next step in its analysis, it would have been forced to decide whether speech conduct between private individuals vice public officials is protected and if it is what level of protection applies to targeted speech directed at private citizens.

In *Hustler v. Falwell*,<sup>30</sup> the Supreme Court clearly articulated the standard to be used when determining harm and recovery by a public figure; they “may not recover for the tort of intentional infliction of emotional distress by reason of publication...without showing...that the publication contains a false statement of fact which was made with ‘actual malice,’ requiring a reckless disregard as to whether or not it was true.”<sup>31</sup>

The Court’s conclusion that public figures cannot recover for the IIED absent a showing of actual malice is telling.<sup>32</sup> The Court went to great lengths to describe the importance of debate on public issues, regardless of the motive of the speaker and why such debate is protected by the First Amendment.<sup>33</sup> The Court refused to accept Mr. Falwell’s position that the “state’s interest in protecting public figures from emotional distress is sufficient to deny First Amendment protection to speech that is patently offensive and is intended to inflict emotional injury, even when the speech could not

reasonably be interpreted to state actual facts about a public figure.”<sup>34</sup> The Court went on to point out that “the First Amendment is bound to produce speech that is critical of those who hold public office or those public figures that are “intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large.””<sup>35</sup> The Court’s emphasis on Mr. Falwell as a public figure was central to the Court’s decision and should have formed the basis for the appellate court’s decision in Snyder.

If the appellate court had made a public/private determination, it would have quickly concluded that Mr. Snyder is a private citizen and the burial of his son was a private event entitled to protection from the actions of the Phelps family. Mr. Snyder did not become a public figure by providing his son’s obituary to the media nor by giving interviews to the local media. He was not in public office, not intimately involved in resolving any issues related to either homosexuals in the military or the war in Iraq, and he was not shaping events of concern to society by voicing his concerns about his son’s death. The only issue of public concern Mr. Snyder was associated with was the Iraq war. He was a grieving father seeking to honor the life and service of his son.<sup>36</sup> The Phelps’ attempt “to build a public forum with [their] own hands is untenable;”<sup>37</sup> they cannot by their own actions transform a private funeral into a public event and then bootstrap their position by arguing Matthew Snyder was a public figure.<sup>38</sup> Labeling Mr. Snyder or his son as a public figure does not make them one and the mere discussion of a public issue, when targeted at a private individual thrust into the public eye as the result of the death of his son does not create a public forum. There is nothing in Albert

Snyder's actions or the actions of his deceased son that transformed either of them into public figures.<sup>39</sup>

Additionally, this was not a matter of public debate on a public issue; it was a funeral. There were no debates outside the church as Matthew Snyder's body arrived. It was not a traditional public forum or platform for debate. It was instead an opportunity for the members of Westboro Baptist Church to gain media coverage for their message at the expense of a grieving family.<sup>40</sup> The appellate court was content with the idea that as long as the speech is outrageous, it is protected. For the court, the degree of outrageousness seems to increase the level of protection afforded the speech. Such an approach is inapposite with the tort of intentional infliction of emotional distress, for there, it is the degree of outrageousness that causes the injury. Outrageousness is the centerpiece.

The Fourth Circuit concluded that even if the pickets could imply anything about Mr. Snyder or his son, they were still entitled to protection because: (1) they do not assert provable facts about an individual, and (2) they clearly contain imaginative and hyperbolic rhetoric intended to spark debate about issues that concern the Phelps family.<sup>41</sup> It is the outrageous nature of the pickets that caused the harm for which Mr. Snyder sought redress. Because the court's analysis stopped with a finding that no defamation occurred, it failed to look at the State's interest in protecting its citizens from unwanted and injurious conduct, as well as how the interests of the State should be balanced against the First Amendment's free speech protections. The Supreme Court was left to sort it out from there.

The Supreme Court had the opportunity to articulate the public/private dichotomy and clarify whether the rules that apply to public figures and officials are the same as those involving private individuals. The Court has a line of cases that discuss the public/private dichotomy, starting with *New York Times Company v. Sullivan*.<sup>42</sup> The Court enunciated for the first time that public officials must show actual malice in order to recover in a suit for defamation. Three years later, the court extended its reasoning to public figures in *Associated Press v. Walker*.<sup>43</sup> Four years later, a plurality of the Court held that a private citizen involuntarily associated with a matter of general public interest has no recourse for injury to his reputation unless he can show the statements were made with actual malice.<sup>44</sup> Finally, in *Gertz v. Robert Welch, Inc.*, a majority of the Court held that private citizens are entitled to more protections from libelous statements than public figures.<sup>45</sup> States may choose to regulate First Amendment speech between private individuals when the result of that speech is injury.

*Gertz* involved an attorney hired to represent the family of a victim killed by a Chicago policeman. An article appearing in a magazine published by Welch alleged that the trial of the policeman was part of a communist conspiracy to discredit the police. The article also implied that Gertz had arranged the trial of the policeman, had a criminal record and labeled him a communist-frontier.<sup>46</sup> Gertz sued. The Supreme Court held that “private individuals are not only more vulnerable to injury than public officials and public figures; they are more deserving of recovery.”<sup>47</sup> Further, the Court concluded that the States have substantial latitude in enforcing remedies for defamatory falsehoods that injure private citizens.<sup>48</sup> While this case dealt with a media defendant, the Court was clear that private citizens are entitled to greater protections from injurious

speech than public figures. The Court could have extended this line of reasoning to include speech activities directed at private citizens. Private citizens, particularly those involuntarily associated with a public event, deserve protection from unwanted and injurious speech from other private individuals. The Maryland IIED statute provides such protection without overburdening speech. It does not limit the “marketplace of ideas” nor chill the exchange of ideas critical to our democracy. The statute merely affords monetary compensation to those injured by the speech of others.

During oral argument, Justice Ginsburg specifically asked, “Why should the First Amendment tolerate exploiting this bereaved family when you have so many other forums for getting across your message...?”<sup>49</sup> The personalized nature of the protest should allow the State to intervene and protect its citizens. The Court could have extended *Gertz* and articulated that protests directed against private citizens are not entitled to the full panoply of First Amendment protection, even if the speech is on a matter of public concern to the speaker. Funerals are not recurring events for a family, but onetime events for a grieving family. Alternatively, the Court could have borrowed from the “captive audience”<sup>50</sup> analysis and allowed Mr. Snyder to recover for the injuries he suffered in conjunction with his son’s funeral based on the uniqueness of the event. The Snyder family had no other opportunity to honor and bury their son. There was no other church and no other cemetery; they could not simply drive to a different location; the Snyder family was captive at the events of the day. The picketing conducted by the Phelps family, while conducted on a public sidewalk in accordance with Maryland laws and regulations, was not directed at the public, but rather at a

particular family. States should be allowed to regulate this conduct in the same manner that the Court has allowed regulation of picketing outside a private residence.<sup>51</sup>

The Court however, took a more pragmatic view, one focused on the constitutional underpinnings of the complaint, rather than on the personalities and emotional conduct involved. The Court did not address the public or private status of the parties, but limited its opinion to whether the speech involved was of a matter of public or private concern. In an 8-1 decision authored by Chief Justice Roberts, the Court held that the Phelps' conduct was shielded from tort liability because their speech was on a matter of public concern.

In reaching their decision, the Court reiterated its previous position that speech on matters of public concern is at the heart of the First Amendment and "occupies the highest rung of the hierarchy of First Amendment values."<sup>52</sup> Relying on the "public concern" definition from *Connick v. Myers*, the Court again held speech is of public concern when it can "be fairly considered as relating to any matter of political, social, or other concern to the community."<sup>53</sup> The Court found the Phelps' speech related to "broad issues of interest to society at large"..."the political and moral conduct of the United States and its citizens, the fate of [the] nation, homosexuality in the military and scandals involving Catholic clergy."<sup>54</sup> The Court went on to point out that "inappropriate or controversial" statements are irrelevant when the subject matter is of public concern.<sup>55</sup>

While this approach is laudable in the academic community as a means of protecting the First Amendment and its associated freedoms, the Court misses an equally important consideration; the right of private citizens to be free from injuries

inflicted by the use of such “inappropriate and controversial” statements during a time of bereavement. Chief Justice Roberts recognized the power of speech when he said, “Speech is powerful. It can stir people to action, move them to tears of both joy and sorrow, and --- as it did here --- inflict great pain.”

Mr. Snyder would have no claim had the Phelps conduct occurred anywhere else. He did not challenge their action at the Maryland capital on the day of his son’s funeral. The IIED claims are intended to compensate victims for “great pain” inflicted by others. A time of bereavement in conjunction with a funeral is a time of significant pain for any family. The additional imposition of “matters of public concern” on a mourning father created significant pain worthy of compensation. Awarding damages would not have prevented the Phelps from carrying their message to the four corners of the Earth, but it would have reminded them that respect for the fallen necessitates taking their protest somewhere else, if only for an hour.

The Court did not extend the “captive audience” analogy to funerals either,<sup>56</sup> refusing to acknowledge that funerals are unique events that may not be easily rescheduled or orchestrated around the acts of others exercising their First Amendment right to free speech. Rather, the Court looked to where the protest occurred, the “archetype of a traditional public forum,”<sup>57</sup> the city sidewalk, finding it to be a suitable platform for engaging in debate on matters of public concern, without any reference to the targeted nature of the speech. For Chief Justice Roberts, because the speech occurred on a public sidewalk and addressed matters of concern to the Phelps family, it was entitled to protection. He found the recurrent nature of their actions indicative that they were not “attacking” the Snyder family because of some personal grudge or

vendetta but were raising issues of legitimate public concern.<sup>58</sup> For the Chief Justice, the timing and location of the protest provided the basis for its protection.

Justice Alito, in his dissent, saw the case differently. The opening sentence of his opinion leaves no doubt about his position: “Our profound national commitment to free and open debate is not a license for the vicious verbal assault that occurred in this case.”<sup>59</sup> Justice Alito saw the majorities’ opinion as lacking for the following reasons: first, the majority held the Phelps’ speech protected because “the overall thrust and dominant theme of their protest spoke to broad public issues.”<sup>60</sup> Justice Alito points out that defamatory speech is actionable, even if it is interspersed with nondefamatory statements. He saw the actions of the Phelps’ no differently. Issues of “broad public concern” are fair game for protests in a public forum, but not outside a funeral. Simply labeling the speech as relating to “public concerns” does not eliminate the injury that resulted from the conduct.

Second, Justice Alito was not swayed by the Courts position that there was no personal relationship between the parties so the speech was not used as some sort of personal vendetta. The majority explained that the speech was not motivated by any sort of private grudge between the parties; the Phelps’s did not use speech on a matter of public concern as a guise for an attack on the Snyder family.<sup>61</sup> Cutting to the heart of the matter, Justice Alito counters, “Respondent’s motivation --- “to increase publicity for its views” --- did not transform their statements attacking the character of a private figure into statements that made a contribution to debate on matters of public concern.”<sup>62</sup> The Phelps family used their speech to attack a family during an extremely vulnerable

period. Their actions added nothing to the public debate on any issue of “public concern,” but were simply hurtful acts upon a grieving family.

Third, Justice Alito noted the majorities’ reliance on the public street forum as a means of shielding the Phelps from liability. Justice Alito again cut to the heart of the matter when he said, “...there is no reason why a public street in close proximity to the scene of a funeral should be regarded as a free fire zone in which otherwise actionable verbal attacks are shielded from liability.”<sup>63</sup> He goes on to say that neither “fighting words” nor defamatory statements are immunized when they occur in public and as such, neither should the language used by the Phelps family. Speech is not protected simply because it is uttered in public or related to a matter of public concern. Justice Alito also points out the number of other venue options available for the Phelps’ protests, including four million miles of public roads.<sup>64</sup>

Finally, Justice Alito takes no comfort in the majorities’ comments on the recently enacted laws in 43 states that prohibit picketing at funerals.<sup>65</sup> As he explains, when Congress enacted the first of these laws and encouraged the States to do the same, there was no discussion that these new misdemeanor laws would remove the need for state law torts like IIED.<sup>66</sup> These new laws merely illustrate Congress’s recognition of the uniqueness of a funeral ceremony and the need for special protections of such events.<sup>67</sup> Additionally, these new laws provide nothing to the injured party. They are criminal statutes enacted after Matthew Snyder’s funeral and in response to the actions of the Phelps family at funerals across the country.<sup>68</sup> They do not compensate families for their pain and suffering.

Justice Alito found no chilling effect on free speech or public debate in the awarding of damages to Mr. Snyder for his suffering at the hands of the Phelps family because of the arduous burden of proof required to award damages in an IIED case.<sup>69</sup> To recover damages, the plaintiff must show injuries that are “so severe that no reasonable man could be expected to endure it.”<sup>70</sup> The well practiced strategy of the Phelps’ family did just that, inflict injuries so severe that the district court jury found no reasonable man should have been expected to endure them. They also obtained the greatest media coverage because their outrageous actions occurred during a period of bereavement.<sup>71</sup> It is the award of damages that will discourage the Phelps family from protesting at funerals, not the potential for a misdemeanor conviction, which will garner more media coverage and prolonged litigation as the Phelps challenge the constitutionality of such a conviction.<sup>72</sup>

In the end however, Justice Alito’s dissent is just that; a dissent. While many are angry and hurt, it remains the duty of those in uniform to support and defend the Constitution that allows the Phelps family to protest at funerals. And while the anger will subside, all should remember that any other decision by the Court might have prevented organizations like the Patriot Guard Riders from participating at funerals of the fallen as a counterpoint to the Phelps family.<sup>73</sup> At Lance Corporal Snyder’s funeral, the Patriot Guard and members of the community lined the street outside Saint John’s Catholic Church, waving American flags and holding pickets too.<sup>74</sup> They significantly outnumbered the Phelps family. The Phelps family served as a rallying point for the community to honor the fallen and support the families left grieving.

The Court's decision might not appear to honor Matthew Snyder's sacrifice, but preservation of the First Amendment's free speech rights is what every service member took an oath to support and defend. While the actions of the Phelps family are nothing short of distasteful, they are protected by the Constitution and will remain so. The thanks these heroes receive for their services comes when communities rally around them at parades and funeral processions. The thanks of a grateful nation also comes when communities provide a shield for the families from groups like the Phelps.

Chief Justice Roberts concludes his opinion by noting that the Court's decision "is limited by the particular facts before [the Court]."<sup>75</sup> It is doubtful that the Court has done anything to slow down the Phelps family. They will continue to conduct their protests where they can get the most media coverage. Their hurtful and abhorrent pickets will not go away. Albert Snyder did his best to restore the peace he believed was stolen from him as he laid his son to rest. In the end, the Court was no help. But the message about the Phelps family and their antics was broadcast loud and clear for all to hear. For those that truly care about honoring the fallen and their families, and for those serving in uniform today, the best course of action remains to grab a flag and a positive picket and stand quietly beside the road as the funeral procession passes. It won't silence the Phelps family, but when whole communities come out in support of heroes and their families, the Phelps will be left with little more than a small piece of the sidewalk surrounded and outnumbered by those who really care. All will know that they have done the right thing in the land of the free and home of the brave.

### Endnotes

<sup>1</sup> Ari Natter, Westminster Marine Dies in Iraq, Carroll County Times, March 8, 2006.

<sup>2</sup> Fred Phelps, Sr., founded Westboro Baptist Church in 1955. This fundamentalist church in Topeka, Kansas has been in the spotlight for a number of years; most recently for their protests at military service member's funerals. The Phelps family content that because of America's acceptance of homosexuality, service members are being killed in combat. They maintain a number of websites, their most prominent, [www.godhatesfags.com](http://www.godhatesfags.com). Their church is attended by approximately 60-70 members, the majority of whom members of the Phelps family.

<sup>3</sup> Isaac Baker, Funeral protesters to be sued for emotional harm, Carroll News Briefs, June 3, 2006.

<sup>4</sup> Snyder v. Phelps, 580 F.3d 206, 223-224 (4<sup>th</sup> Cir. 2009).

<sup>5</sup> Brief for Petitioner (Petr.'s Br. 4), Snyder v. Phelps, May 24, 2010 (No. 09-751).

<sup>6</sup> Snyder v. Phelps, 533 F.Supp.2d 567, 572 (D. Maryland 2008).

<sup>7</sup> Id.

<sup>8</sup> Id.

<sup>9</sup> Id. Shirley Roper-Phelps posted an "epic" on the church's website approximately four weeks after Matthew's funeral. The epic was entitled, "The Burden of Marine Lance Cpl. Matthew Snyder" and stated that Albert Snyder and his ex-wife raised Matthew for the devil and taught him that God was a liar.

<sup>10</sup> 580 F.3d at 210.

<sup>11</sup> Id. at 212. The district court dismissed the publicity given to private life and defamation claims following a motion to summary judgment filed by the Phelps family.

<sup>12</sup> Id. at 211. The district court reduced the jury award by half, finding the punitive damages award in the amount of eight million dollars to be excessive.

<sup>13</sup> 580 F.3d at 211. The Phelps family raised seven issues on appeal: lack of personal jurisdiction, to privacy interest in the funeral of a loved one, that punitive damages contravene due process, that the jury was impermissibly biased, that the district court made prejudicial evidentiary errors at trial and the civil conspiracy verdict is inconsistent with state law and that Maryland's statutory cap on compensatory damages applied to the damage award.

<sup>14</sup> Brief for Respondent, (Resp't Br. 33) Snyder v. Phelps, July 7, 2010 (No. 09-751).

<sup>15</sup> *Supra* note 5 at 22.

<sup>16</sup> Brief of Appellant (Appellant Br. 11-17), Snyder v. Phelps, 580 F.3d 206 (4<sup>th</sup> Cir. 2009). The Phelps family raised eight additional issues on appeal: lack of personal jurisdiction; if a privacy right exists in a funeral, restrictions placed on any picketing were not content neutral and narrowly tailored; that punitive damages contravene due process; that the jury was impermissibly biased; that the district court made prejudicial evidentiary errors at trial; that the civil conspiracy verdict is inconsistent with state law; that Maryland's statutory cap on

compensatory damages applied to the damage award; and that a stay without bond should be granted in the case.

<sup>17</sup> Black's Law Dictionary 375 (5th ed. 1979). "A communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him."

<sup>18</sup> 580 F.3d at 223.

<sup>19</sup> 497 U.S. 1 (1990).

<sup>20</sup> Id. citing Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767 (1986).

<sup>21</sup> Id. see e.g., Greenbelt Cooperative Publishing Assn., Inc. v. Bresler, 398 U.S. 6 (1970).

<sup>22</sup> New York Times, Co. v. Sullivan, 376 U.S. 254, 286 (1964).

<sup>23</sup> *Supra* note 4, citing CACI premier Tech., Inc. v. Rhodes, 536 F.3d 280, 301 (4<sup>th</sup> Cir. 2008).

<sup>24</sup> 533 F.Supp.2d at 578.

<sup>25</sup> 580 F.3d at 224.

<sup>26</sup> Hamilton v. Ford Motor Credit Company, et al, 66 Md.App. 46, 58 (Court of Special Appeals of Maryland, 1986). The elements of an intentional infliction of emotion distress claim are: the conduct must be intentional or reckless; the conduct must be extreme and outrageous; there must be a causal connection between the wrongful conduct and the emotional distress; the emotional distress must be severe. Maryland state law applies in cases filed in the Maryland federal district court involving parties from different states.

<sup>27</sup> Bose Corporation v. Consumers Union of the U.S., Inc., 466 U.S. 485, 499 (1985) (quoting New York Times, 376 U.S. at 284-286).

<sup>28</sup> See generally, Hustler v. Falwell, 485 U.S. 46 (1988).

<sup>29</sup> See generally, Gertz v. Welch, 418 U.S. 323 (1974)

<sup>30</sup> *Supra* note 28.

<sup>31</sup> Id. at 56. In *Hustler*, the magazine published a parody based on a Campari Liqueur advertisement that contained a picture of Jerry Falwell discussing his "first time." The cartoon played on the sexual double entendre of the general subject of first times, referring to the first time Mr. Falwell sampled Campari Liqueur, but couched the "interview" to portray Mr. Falwell's first sexual encounter during a drunken rendezvous with his mother in an outhouse. The magazine noted the ad as a parody and that it should not be taken seriously.

<sup>32</sup> Id. at 57. The Court characterized Jerry Falwell as a public figure because of his activities as the host of a nationally syndicated television show and his involvement as the founder of the Moral Majority and of Liberty University.

<sup>33</sup> Id. at 51.

<sup>34</sup> Id. at 50.

<sup>35</sup> Id. at 51, citing Associated Press v. Walker, decided with Curtis Publishing Company v. Butts, 388 U.S. 130, 164 (1987) (Warren, C.J., concurring in result).

<sup>36</sup> Id.

<sup>37</sup> Perry Education Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 49 Fn. 9.

<sup>38</sup> 533 F.Supp.2d at 577.

<sup>39</sup> *Hustler*, 485 U.S. at 51.

<sup>40</sup> 533 F.Supp.2d at 571.

<sup>41</sup> 580 F.3d at 223.

<sup>42</sup> 376 U.S. 254 (1964).

<sup>43</sup> 388 U.S. 130, 167 (1967).

<sup>44</sup> Gertz v. Robert Welch, Inc., 418 U.S. 323, 336 (1974) citing Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 43 (1971).

<sup>45</sup> 418 U.S. 323 (1974).

<sup>46</sup> Id. at 326.

<sup>47</sup> Id. at 345.

<sup>48</sup> Id. at 345-346.

<sup>49</sup> S. Ct. Transcript at 31:15-18

<sup>50</sup> Frisby v. Schultz, 487 U.S. 474, 487 (June 1988). The First Amendment permits the government to prohibit offensive speech as intrusive when the “captive audience” cannot avoid the objectionable speech. In *Frisby*, the Court found that a local ordinance that prohibited picketing outside a private residence did not infringe on First Amendment free speech. The Court found a “resident is figuratively, and perhaps literally, trapped within the home, and because of the unique and subtle impact of such picketing is left with no ready means of avoiding the unwanted speech. Thus, the “evil” of targeted residential picketing, “the very presence of an unwelcome visitor at the home,” is “created by the medium of expression itself.” The same could be said of picketing at a funeral.

<sup>51</sup> See generally, Frisby v. Schultz, 487 U.S. 474 (1988).

<sup>52</sup> 472 U.S. 749 (1985).

<sup>53</sup> 461 U.S. 138, 146 (1983).

<sup>54</sup> 562 U.S. (2011) p. 8.

<sup>55</sup> 562 U.S. (2011) (p. 7) citing Ranking v. McPherson, 483 U.S. 378, 387 (1987).

<sup>56</sup> Frisby v. Schultz, 487 U.S. 474 (1988).

<sup>57</sup> Id. at 480.

<sup>58</sup> Snyder v. Phelps, No. 09-751, (S.Ct. decided Mar. 2, 2011 at p. 9).

<sup>59</sup> Snyder v. Phelps, No. 09-751, (S.Ct. decided Mar. 2, 2011, Alito Dissent at p. 1).

<sup>60</sup> Id. at 8.

<sup>61</sup> Id. at 9.

<sup>62</sup> Id. 10.

<sup>63</sup> Id. 10-11.

<sup>64</sup> Snyder v. Phelps, No. 09-751, (S.Ct. decided Mar. 2, 2011 Alito Dissent p.4).

<sup>65</sup> Brief for American Legion as *Amicus Curia* 18-19, n.2 (listing statutes). 38 U.S.C. § 2413 “Prohibition on certain demonstrations at cemeteries under control of the National Cemetery Administration and at Arlington National Cemetery,” is the federal statute regulating demonstrations at or near funerals at national cemeteries. 18 U.S.C. § 1887 imposes misdemeanor criminal liability for violation of the 38 U.S.C. § 2413; 18 U.S.C. § 1888 imposes misdemeanor criminal liability for military funerals. There are currently 43 state statutes regulating picketing at or near funerals. All carry misdemeanor criminal liability. Ala. Code § 13A-11-17; Ark. Code Ann. § 5-71-230; Cal. Penal Code § 594.35; Colo. Rev. Stat. §§ 13-21-126, 18-9-101, -106(3), -107(3), -108(2), -117, -125; Conn. Gen. Stat. § 53a-183c; Del. Code Ann. Tit. 11, § 1303; Fla. Stat. Ann. §§ 871.01-.02; Ga. Code Ann. § 16-11-34.2; Idaho Code Ann. § 18-6409(2); 720 Ill. Comp. Stat. 5/26-6; In. Code §§ 35-45-1-3, -2-1; Iowa Code Ann. § 723.5; Kan. Stat. Ann. § 21-4015a; Ky. Rev. Stat. Ann. §§ 525.055, .060, .145, .155; La. Rev. Stat. Ann. § 14:103; Me. Stat. 17-A § 501-A; Md. Code Ann., Crim. Law § 10-205; M.G.L.A. 272 § 42A; M.C.L.A. §§ 123.1111-.1115; Minn. Stat. § 609.501; Miss. Code Ann. § 97-35-18; Mo. Rev. Stat. §§ 578.501--502; MCA 45-8-116; Neb. Rev. Stat. §§ 28-1320.01-.03; N.H. Rev. Stat. § 644:2-b; N.J. Stat. Ann. § 2C:33-8.1; N.M. Stat. Ann. § 30-20B-1--5; N.Y. CLS Penal § 240.21; N.C. Gen. Stat. Ann. § 14-288.4; N.D. Cent. Code, § 12.1-31-01.1; Ohio Rev. Code Ann. § 3767.30; Okla. Stat. Ti. 21, § 1380; 18 Pa. Cons. Stat. Ann § 7517; R.I. Gen. Laws § 11- 11-1; S.C. Code Ann. § 16-17-525; S.D. Cod. Laws §§ 22-13-17 to-20; Tenn. Code Ann. § 39-17-317; Tex. Penal Code Ann. §§ 42.04, .055; Utah Code Ann. § 76-9-108; 13 Vt. Stat. Ann. § 3771; Va. Code Ann. § 18.2-415; Wash. Rev. Code Ann. § 9A.84.030; Wis. Stat. § 947.011; Wyo. Stat. Ann. § 6-6-105.

<sup>66</sup> Snyder v. Phelps, No. 09-751, (S.Ct. decided Mar. 2, 2011, Dissent at p. 11).

<sup>67</sup> Id.

<sup>68</sup> 18 U.S.C. 1388 was effective December 22, 2006, nine months after Lance Corporal Snyder's funeral. 38 U.S.C. 2413 was effective May 29, 2006.

<sup>69</sup> Id. at p. 2.

<sup>70</sup> Id. at p. 2, citing Restatement (Second) of Torts § 46, Comment *j* (1964-1964).

<sup>71</sup> Id. at 5-6.

<sup>72</sup> Phelps-Roper v. County of St. Charles, 2011 WL 227561 (E.D.Mo. Jan. 24, 2011) The Phelps family successfully challenged the Missouri funeral protest statute and were granted an injunction preventing its enforcement.

<sup>73</sup> <http://www.patriotguard.org/>. The Patriot Guard Riders are a diverse amalgamation of riders from across the nation with an unwavering respect for those who risk their very lives for America's freedom and security. Their mission is to attend the funeral services of fallen American heroes as invited guests of the family. They show respect to the "fallen heroes", their families and community while acting a shield for the mourning family and their friends from any interruptions created by protestors. They were formed in Kansas as a direct result of the action of Westboro Baptist Church at military funerals.

<sup>74</sup> Brief for Respondents at 6, Snyder v. Phelps, No. 09-751 (U.S. Supreme Court July 7, 2010).

<sup>75</sup> Snyder v. Phelps, No. 09-751, (S.Ct. decided Mar. 2, 2011 at p. 14).

